Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TECHNICAL SERGEANT LARRY E. MARSHALL,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

Marge A. Overly
Captain, United States Air Force
Appellate Defense Division
Counsel of Record

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
202-767- 1562

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it held that petitioner received the effective assistance counsel envisioned by the Sixth Amendment.

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The petitioner, Technical Sergeant Larry E. Marshall, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 30 September 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, awaiting publication __ M.J.__ (30 September 1996), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (A.F. Ct. Crim. App., February 8 1995), is located at Appendix B. The unpublished opinion of the United States Air Force Court of Military Review (September 23, 1992) is located at Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 30 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp.1996) and 10 U.S.C.A. § 867(a) (West Supp.1996).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the Constitution of the United States provides in relevant part:

In all criminal prosecutions, the petitioner shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The petitioner, after serving approximately 17 and one half years in the United States Air Force, received two "referral" Enlistment Performance Reports [EPR]. R. 15–16. In an attempt to have these removed from his records he

sought legal advice from a civilian defense attorney, Mr. Bernstein, who practiced military law in Fairfield, California. At their first meeting, the petitioner expressed to Mr. Bernstein his concern that his career was in jeopardy and his desire to salvage it. R. 41.[1] He supplied the attorney with, *inter alia,* copies of the EPR's and two other associated records of disciplinary actions.

Mr. Bernstein advised the petitioner that the process of appealing the EPRs could be lengthy and that they would first have to exhaust administrative remedies and then apply to the Board of Correction of Military Records. Mr. Bernstein discussed his fee with the petitioner, however, the petitioner did not retain Mr. Bernstein on this occasion. R. 13–14.

On 22 December 1990, the petitioner was apprehended at the gate of Travis Air Force Base for driving while intoxicated. On 3 January 1991, the petitioner was offered an Article 15 for willfully driving on a suspended license, and drunk and disorderly conduct.

On or about 7 January 1991, the petitioner again met with Mr. Bernstein. At the *DuBay* hearing, Mr. Bernstein could not remember whether the petitioner had been offered the Article 15 or had been merely advised that it would be offered. R. 42. Although the petitioner admitted he was drunk and disorderly, he stated that his license was not suspended at that time.[2] Mr. Bernstein assumed an administrative discharge would inevitably result from choosing an Article 15 as the

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[1] All citations pertain to the record of the *DuBay* hearing. 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

[2] Apparently, the Division of Motor Vehicles computer records had not yet been updated to reflect that his suspended license was recently reinstated. TSgt Marshall had verbally confirmed this for himself through the local Fairfield police. See Civilian Counsel's "Response to SJA's Post-trial Recommendation" at page 2. ROT Volume I.

forum in which to handle the disciplinary action. At the *DuBay* hearing, Mr. Bernstein could not recall the basis for this assumption, other than his belief that the petitioner had been told this by the commander or that the petitioner made the assumption. R. 44–45. Mr. Bernstein never attempted to validate the truth of this assumption through the petitioner's commander or anyone else. R. 46. In Mr. Bernstein's opinion, the petitioner had two alternatives, neither of which were attractive. If the petitioner accepted the Article 15, he would then face an administrative discharge board. If he turned down the Article 15, he would face a court–martial. In Bernstein's opinion, the petitioner had a better chance of saving his career in a court–martial than in an administrative discharge board. R. 56. Bernstein based this evaluation in part upon the differing burdens of proof in boards and courts. In a board, the burden of proof would be by a preponderance of the evidence and the members would be looking at the entire record, including both on–duty performance and off–duty conduct. Given the two referral EPR's, Mr. Bernstein was of the opinion that the petitioner stood a better chance in a court–martial. He also felt that members are sometimes reluctant to adjudge a bad conduct discharge in a court–martial. R. 17. The petitioner did not retain Mr. Bernstein at this time.

On 14 January 1991, the initial Article 15 was withdrawn; a second Article 15 was offered. This Article 15 contained four specifications: dereliction of duty for driving while under a suspended license, driving while intoxicated, disorderly conduct and failure to obey an order to submit to a blood alcohol test. R. 48–49.

On 15 January 1991, the petitioner went to the Air Force Area Defense Counsel, Captain Kenneth Trigg, to seek advice on this second Article 15. Captain Trigg advised the petitioner of his rights relating to the Article 15. He explained to the

petitioner that he had the option of accepting the Article 15 or turning it down and demanding a trial by court–martial. The petitioner was concerned that by accepting the Article 15 he would be admitting guilt. He wanted to respond to the suspended license allegation. Captain Trigg informed the petitioner that accepting the Article 15 was not an admission of guilt and he could submit a statement to his commander regarding the offenses. The petitioner made another appointment to see Capt Trigg the next day, 16 January 1991, eventually canceling that appointment. See App. Ex. XVIII: Capt Trigg's Affidavit dated 12 August 1992. The petitioner was wary of Capt Trigg, seeing him as a government attorney. See App. Ex. XX: Petitioner's Affidavit dated 22 July 1992.

The petitioner went back to see Mr. Bernstein on 16 January 1991. According to the petitioner, Mr. Bernstein advised him to turn down the Article 15 and demand a trial by court–martial because the petitioner would have to admit his guilt by accepting the Article 15.[3] See App. Ex. XIX: Petitioner's Affidavit dated 12 Nov 1991. Mr. Bernstein assured the petitioner that he was an expert on military law.[4]

Mr. Bernstein testified that it was apparent to him that an

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[3] Based on his *DuBay* hearing testimony, it is not clear what advice Mr. Bernstein gave the petitioner as to the effect of accepting the Article 15. During his testimony, Mr. Bernstein indicated that he discussed the meaning of accepting the Article 15 with the petitioner. According to him, he indicated that if the petitioner accepted an Article 15, that would not be admitting guilt and that the Article 15 was nonjudicial. Nevertheless, post-trial submissions by Mr. Bernstein indicate he believed it would be inappropriate to accept an Article 15 if one of the specifications were groundless and equated the Article 15 process to the *Care* inquiry.

[4] When asked at the *DuBay* hearing whether he represented himself as an "expert" on military law, Mr. Bernstein simply demurred if there was such a status as "expert" in military law since there were no certification rules for that specialty in California. R. 30.

administrative discharge was a forgone conclusion if the petitioner accepted the Article 15. R. 49. However, Mr. Bernstein never tried to verify that a discharge was contemplated or an inevitable consequence of accepting the Article 15. R. 15–16; See also, App. Ex. XXV and XXVI. Although Mr. Bernstein denied making any promises to the petitioner (R. 18), the petitioner stated in his post–trial affidavits that Mr. Bernstein advised him that he would not receive a bad conduct discharge at the court–martial despite the fact that he would be convicted of some of the charges. App. Ex. XIX: Petitioner's Affidavit dated 12 Nov 1991. Based upon Mr. Bernstein's advice, the petitioner turned down the Article 15 and demanded trial by court–martial.

On 8 February 1991, charges were referred to court–martial. Additional charges of failing to obey lawful orders were referred on 15 February 1991. Trial was scheduled for 28 February 1991. Petitioner was initially facing three Charges, violations of Articles 92, 111, and 134, UCMJ, respectively. (DD Form 458, Charge Sheet, dated 7 Feb 91.) Charge I, violation of Article 92, UCMJ, was withdrawn by the convening authority before arraignment. (Original R. 11; DD Form 458, Charge Sheet, dated 7 Feb 91.) Charge II, violation of Article 111, UCMJ, and Charge III, violation of Article 134, UCMJ, were then renumbered as Charge I and Charge II respectively. (Original R. 12; DD Form 458, Charge Sheet, dated 7 Feb 91.)

On 12 February 1991, Mr. Bernstein, Capt Trigg and the petitioner met to discuss the petitioner's decision to refuse the Article 15 and the subsequent court–martial. Capt Trigg continued to recommend acceptance of the Article 15 and point out the folly of risking a bad conduct discharge at a court–martial. App. Ex. XVII: Capt Trigg's Affidavit dated 24 Oct 1991. Mr. Bernstein told Capt Trigg that his compensation package included representation at an

administrative discharge board after the court–martial because he told the petitioner it was unlikely that the petitioner would receive a punitive discharge from the court–martial. App. Ex. XVII.

A second meeting occurred on 27 February 1991, the day before trial, involving the three parties. Capt Trigg informed the petitioner and Mr. Bernstein that the Article 15 was still being offered by the convening authority, and that the petitioner could still accept it and avoid the court–martial. At this point, Mr. Bernstein interrupted Capt Trigg, instructing him that his role was limited solely to procedural questions, and stating that "we're going with the court–martial," and "I'm the expert here. " See App Ex. XX and XVII. Mr. Bernstein told the petitioner to turn down the Article 15 and acknowledged that he would be convicted of at least some of the charges.

On 28 February and 1 March 1991 a special court–martial at Travis Air Force Base, California tried petitioner for charges of violating Articles 111 (DUI), 134 (drunk and disorderly conduct), and 90 (disobeying a lawful order––two specifications). During the court–martial, Mr. Bernstein handled the petitioner's case. Contrary to his pleas, the court–martial found him guilty of all charges and specifications, except one specification of disobeying a lawful order. The court–martial sentenced petitioner to a bad conduct discharge and reduction to the grade of E–1. On 2 July 1991, the convening authority approved the findings and sentence as adjudged.

On his initial appeal to the United States Air Force Court of Criminal Appeals, the petitioner appealed his conviction on the basis that the advice of his civilian counsel to turn down an Article 15 and proceed to trial, constituted ineffective assistance of counsel, and was motivated solely by counsel's desire to generate legal fees. The offenses underlying the

Article 15 were the same as those charged at trial. The Article 15 was offered to the petitioner up until the day of trial. In his initial appeal, the petitioner asked the court to set aside the conviction, or in the alternative, for a *DuBay* hearing to further expand upon the issue of ineffective assistance of counsel.

The United States Air Force Court of Criminal Appeals affirmed the findings and sentence in its decision dated 23 September 1992.

Petitioner appealed the decision of the Air Force Court of Criminal Appeals to the United States Court of Appeals for the Armed Forces. In an order dated 9 March 1994, the Court ordered a *DuBay* hearing for the purpose of determining the advice given to the petitioner and the tactical and legal considerations on which the advice was based.

A *DuBay* hearing was convened at Travis Air Force Base, California, on 19 and 26 May 1994. In an affidavit submitted during the *DuBay* hearing, the Staff Judge Advocate at the time of the petitioner's court–martial, Lieutenant Colonel (Retired) John S. Hannah, stated he was not aware of any contemplated discharge action. No promises were made either way, but he was not recommending a discharge action. He expressed to Capt Trigg that the Article 15 turn–down was ill–advised, that a conviction would result and that a bad conduct discharge was likely. In fact, after trial, he recommended suspension of the bad conduct discharge in clemency. App. Ex. XXVI.

An affidavit was submitted by Capt Arlen Bee, the assistant trial counsel. Capt Bee stated Mr. Bernstein never contacted him regarding the likelihood of an administrative discharge action should the petitioner accept the Article 15. To Capt Bee's knowledge, no one on the government's side was pushing an administrative discharge action, but similarly, it had not been ruled out. As Capt Bee pointed out, the

petitioner would have been eligible for lengthy service consideration if a discharge action had been initiated. App. Ex. XXV.

Captain Terry McElyea, the former ADC at Travis AFB, provided a sworn affidavit at the *DuBay* hearing. According to Capt McElyea, Capt Trigg was "beside himself" because Mr. Bernstein was being so difficult, and was essentially interfering with Trigg's attempts to explain to the petitioner the ramifications of going to trial. Capt McElyea believed he would have heard if the unit was contemplating an administrative discharge after the Article 15 action. He heard no such talk. Also, Capt McElyea believed that Capt Trigg would have told him if there had been talk of an administrative discharge. Neither Capt Trigg nor the SJA, according to Capt McElyea, suggested a discharge was an issue. App. Ex. XXIV.

In a 28 Dec 1990 letter from Lt Col Robert Harsha, the petitioner's commander, to the Staff Judge Advocate entitled Request for Article 15 Assistance, Lt Col Harsha indicated he was not contemplating administrative discharge action. In fact, on the AF Form 65, Transmittal of Court–martial Charges, dated 7 February 1991, Lt Col Harsha wrote:

> TSgt Marshall's duty performance has been up to standard's [sic] expected of his grade. He has earned the respect of his peers and subordinates both military and civilian. They freely come to him for guidance and solutions to problems on the job. It is anticipated his effectiveness will increase once current personal problems are resolved.

App. Ex. XXII. Despite the comments on the AF Form 65 and the letter to the SJA, Lt Col Harsha testified at the *DuBay* hearing that he intended to initiate discharge action and communicated this to the petitioner. R. 88. However, under cross–examination, Lt Col Harsha admitted that if he

had been approached by Mr. Bernstein concerning some type of alcohol rehabilitation, he would have considered the request. R. 92.

Having reviewed the case in light of the factfinding hearing, the Air Force Court of Criminal Appeals again concluded that the petitioner was not denied the effective assistance of counsel. The Air Force Court affirmed the findings and sentence in its 8 February 1995 decision.

The Court of Appeals for the Armed Forces, by order dated 17 July 1995, granted review of the issue of whether petitioner was denied the effective assistance of counsel when he turned down an Article 15 after his civilian defense counsel provided incorrect and untenable advice concerning the outcome of going to trial. The Court held that the petitioner was not denied the effective assistance of counsel; his civilian defense attorney presented him with competent legal advice concerning the options available to him and their ramifications for his future military career.

In reaching this conclusion the Court of Appeals for the Armed Forces assumed, without answering the question of whether Sixth Amendment rights attach to advice given to proceed to trial rather than accept an Article 15, where made prior to preferral of charges. *But see,* Senior Judge Everett's concurring opinion. The Court reasoned further that any misadvice as to acceptance of the Article 15 being an admission of guilt, was non prejudicial since the dispute really was whether the Article 15 would lead to an administrative discharge action. Finally the Court found that any advice as to the petitioner not receiving a bad conduct discharge at the court–martial, was not ineffective assistance of counsel, noting that the attorney denied making the statement at the *DuBay* hearing. The Court stated that miscalculation as to the likely end result does not equal deficient performance. And, the defense counsel advised the petitioner of the potential for

an administrative discharge even if no bad conduct discharge were awarded at trial.

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED BY HOLDING THAT THE PETITIONER WAS PROVIDED EFFECTIVE ASSISTANCE COUNSEL BY HIS CIVILIAN DEFENSE COUNSEL WHO ADVISED PETITIONER TO CHOOSE TO CONTEST HIS GUILT OF THE CHARGED OFFENSES IN A COURT–MARTIAL, RATHER THAN IN THE NON–JUDICIAL SETTING OF AN ARTICLE 15 HEARING.

The Sixth Amendment and the Uniform Code of Military Justice confer upon a military accused the right to the effective assistance of counsel. *United States v. Scott,* 24 M.J. 186 (C.M.A. 1987). The standard for measuring a claim of ineffective assistance of counsel is set forth by this Court in *Strickland v. Washington,* 466 U.S. 668, 687 (1984). In order for an petitioner to prevail, he must establish the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second–guess counsel's assistance after conviction or adverse

sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland, supra* at 689–690.

A. Assessment of civilian counsel's pretrial advice to reject the Article 15 is governed by those cases that have applied ineffective assistance claims under *Strickland v. Washington* to pretrial matters and plea bargaining.

In the case *sub judice,* the rejection of the offer to contest petitioner's guilt at a non–judicial Article 15 hearing in lieu of trial is no different than those situations involving offers of pretrial agreements or plea bargaining where the petitioner relies on counsel's advice, rejects an offer, is convicted and receives a less favorable sentence. The Court of Appeals for the Armed Forces has applied *Strickland* in this context in a modified form. *See, United States v. Lonetree,* 35 M.J. 396 (C.M.A. 1992)(petitioner entitled to *DuBay* hearing, or rehearing on sentence, to assess whether allegedly ineffective assistance of civilian counsel existed with petitioner's decision to reject plea negotiations, and if so, whether ineffective assistance affected petitioner's sentence); *see also, In re Alvernaz,* 2 Cal. 4th 924, 830 P. 2d 747 (Cal. 1992)(stating a defendant is deprived of his federal constitutional rights to effective assistance of counsel when his lawyer gives him substandard advice that induces him to decide to reject a plea offer; that even a fair trial following rejection of the offer does not adequately cure the error; remedy would be resubmission of plea bargain); *and, Jones v. Murray,* 947 F.2d 1106, 1110–1111 (4th Cir. 1991)(applied *Strickland* to determine if counsel's failure to persuade client to accept plea bargain was ineffective assistance. Stating there are some situations where counsel has an affirmative duty to persuade acceptance, " [t]his is the kind of case which should

never have been tried. In this kind of case, nothing is gained for the defendant by going to trial . . . other opportunities may be lost by such action . . ." [*citing United States v. Jones,* 392 F.2d 567 (4th Cir. 1968)]).

In summarizing case law to date, the California Supreme Court in *Alvernaz,* supra, concluded that,

> all federal and state courts presented with the issue where counsel's ineffective representation results in defendant's rejection of an offered plea bargain, and in defendant's decision to proceed to trial, give rise to a claim of ineffective assistance of counsel.

Alvernaz, supra at 933–934, *citing in support Lewandowski v. Makel,* 949 F.2d 844 (6th Cir. 1991); *United States v. Rodriguez-Rodriguez,* 929 F.2d 747, 752–53, n. 1 (1st Cir. 1991)(holding that providing inadequate advice as to an offered plea bargain and the consequences of rejection warrants a hearing). The *Alvernaz* court stated that the remedies for the ineffective assistance claims in these cases required that relief be "tailored to the injury suffered." *Alvernaz,* supra at 942, *citing in support United States v. Morrison,* 449 U.S. 361, 364 (1981). The *Alvernaz* court noted that most courts in determining a remedy have vacated the judgment of conviction and remanded for resumption of plea bargaining. *Alvernaz,* supra at 942.

The modified approach applied by all the aforementioned courts was to evaluate under the dual prongs of *Strickland,* whether the pretrial advice rendered by counsel was "deficient performance" and if it prejudiced the defendant by inducing him to reject the offered pretrial agreement or plea bargain that would have led to a more favorable outcome. The *Alvernaz* court stated that limiting the *Strickland* prongs to apply only to performance and prejudice at trial, and not pretrial matters, was an

> overly narrow reading of *Strickland's* delineation of the functions of counsel . . . [and] . . . the position that a fair trial remedies the ineffective assistance which led the defendant to reject an offered plea bargain disregards petitioner's specific complaint of constitutional injury.

Alvernaz, supra at 935. As a result, legal error at trial was not at issue in such claims, and *Strickland* was applied only to the pretrial advice and affect on final punishment.

As previously mentioned, this approach was followed by the Court of Appeals for the Armed Forces in *Lonetree, supra.* The rejected plea bargain in *Lonetree* involved pleading guilty to court–martial charges (unlike rejecting an Article 15 as in the case *sub judice*), the Court held that the convictions would stand and only the sentence would be affected.

The tailored remedy sought by the petitioner here is consistent with those courts that have addressed similar situations, to set aside his conviction.

Despite the growing number of courts that have adopted the *Strickland* standard to counsel's pre–trial advice, both the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces, in addressing this issue in the case *sub judice,* merely "assumed" that the *Strickland* standard applied to Mr. Bernstein's pre–trial advice to the petitioner. *United States v. Marshall,* pp. 3, ACM S29406 (f rev), unpub. (A.F. Ct. Crim. App. 1995); *United States v. Marshall,* ___ MJ___, slip op. 9 (1996). The petitioner suggests that a more definitive answer is required of an appellate court on this important issue.

B. Under *Strickland,* the pretrial advice of civilian counsel to turn down the Article 15 was deficient performance and under the

circumstances prejudiced petitioner by inducing him to reject an offered Article 15 in lieu of trial that would have led to a more favorable punishment.

Contrary to the decision of the Court of Appeals for the Armed Forces, applying the modified *Strickland* standard to the case *sub judice,* Mr. Bernstein's representation was deficient, and his deficiency subjected the petitioner to a punishment far more devastating than he would have received from an Article 15. Under the circumstances, civilian defense counsel's advice and conduct regarding the Article 15 were shocking and unconscionable particularly in view of the petitioner's 17 and one–half years of service.

The facts set forth above speak for themselves. First, Mr. Bernstein gave the petitioner flat out wrong advice, that is, that contesting his guilt at an Article 15 hearing would be an admission of guilt. Mr. Bernstein's testified at the *DuBay* hearing that he did not counsel the petitioner that acceptance of the Article 15 equated to an admission of guilt. However, his post–trial submission in response to the SJA's trial recommendations contradict his testimony. Addressing what he considered to be vindictive prosecution for rejecting the Article 15, Mr. Bernstein was explaining to the convening authority why the petitioner couldn't accept the Article 15 when offered. Mr. Bernstein stated:

> Under the Military Justice System, an petitioner is not supposed to plead guilty to something he is not guilty of as illustrated by the *Care* inquiry required before accepting a guilty plea in a Court Martial. Although this rule does not explicitly apply to Article 15's [sic], its spirit does. In California state courts, a contrary rule applies as announced by the California Supreme Court in *People v. West.* A

> defendant may plead guilty to a charge even though he is not guilty of the specific charge in order to avoid more serious charges of which he may in fact be guilty.
>
> Thus, given the sequence of charging in the case at hand, the defendant would have been well advised to accept the first Article 15 if it were legally proper under the military system. *However, since it wasn't proper for him to admit guilt under the military system to the suspended license charge, he didn't.*

Response to SJA's Post Trial Recommendation, p. 3, ROT Volume I (emphasis added). This passage demonstrated Mr. Bernstein's gross misunderstanding of the Article 15 process. Yet, he contended that he was the expert on military law.[5]

Secondly, working to further prejudice and induce the petitioner to accept his advice, Mr. Bernstein told the petitioner that he would not receive a bad conduct discharge from the court–martial members.[6]

Third, Mr. Bernstein interfered with Capt Trigg's attempts to dissuade the petitioner from going to trial.[7] Bernstein essentially "gagged" Capt Trigg at the 27 Feb 1991

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[5] As previously mentioned, when asked if he represented himself as an "expert" on military law, Mr. Bernstein simply demurred if there was such a status as "expert" in military law since there were no certification rules for that specialty in California. R. 30

[6] Again, although Mr. Bernstein testified that he made no such promise to the petitioner (R. 17), both the petitioner's affidavit (App. Ex. XIX) and Capt Trigg's affidavit (App. Ex. XVII) state that Mr. Bernstein informed the petitioner that he would not receive a bad conduct discharge.

[7] See App. Ex. XX: Petitioner's affidavit; App. Exs. XVII and XVIII: Capt Trigg's affidavits; and App. Ex. XXIV: Capt McElyea's affidavit.

meeting of the parties when he informed Capt Trigg that his role was limited to procedural questions and telling Capt Trigg "[w]e're going with the court–martial." [8]

Finally, putting aside the blatantly wrong advice concerning the acceptance of the Article 15 and the misleading advice about the probable sentence from the court–martial, Mr. Bernstein's "tactical" decision to proceed to a court–martial in lieu of an Article 15 and a possible administrative discharge board[9] was unreasonable even under the highly deferential light shone on counsel's assistance under *Strickland. See also, United States v. Morgan,* 37 M.J. 407 (C.M.A. 1993)(tactical decisions by counsel are not second guessed, unless made unreasonably).

Mr. Bernstein testified that the advantages of a court–martial over an administrative discharge were 1) "the lesser burden of proof" at an administrative discharge (R. 16, 17); 2) board members look at the entire record, including both on-duty and off–duty conduct. Given his two referral EPRs, "I think the odds would have been extremely and highly against him in a discharge board more so than in a court–martial" (R. 17); and 3) "sometimes court–martial members [were] a little more reluctant to adjudge a BCD." (R. 17). Contrast Mr. Bernstein's "tactical" reasons for proceeding to court–martial with his testimony under cross–examination:

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[8] See App. Ex. XX: Petitioner's affidavit.

[9] Neither the command nor the legal office was pushing for an administrative discharge action to follow the Article 15. Although Lt Col Harsha testified that he was contemplating discharge, his own written documentation created at the time of the offenses suggested otherwise. In addition, Lt Col Harsha admitted that an administrative discharge was not a forgone conclusion.

Q: Given your statement in the letter, looking back on things, prior to going to court weren't you just a bit concerned knowing that you and your client would be walking into the sentencing portion of a court–martial with two 1 EPRs?

A: Oh yeah. I mean he was choosing between two bad alternatives. That's why he originally came to see me was because of those bad EPRs. Those EPRs he was stuck with whether it was in a discharge board or a court–martial.

Q: And your advice, not withstanding the EPRs, was that you had a "good shot"––shall we say––at minimizing the severity of the sentence at a special court–martial?

A: No. His purpose of hiring a private attorney was that he had a seventeen and a half year career and was facing two very difficult alternatives, both of which had a very high probability of terminating his career after seventeen and a half years.

Q: Mr. Bernstein—

A: How do I try to"––you know––"What's the best way to prevent that?" It is not a good way; it is just the least of the two bad alternatives.

Q: *Wasn't the end result of your advice though was that you would, in fact, be subjecting him to both alternatives by doing it in the order in which you did it?*

A: *Well, possibly. Although if he didn't get a bad conduct discharge at the court–martial then his chance that either an administrative discharge wouldn't be initiated or if it was, his chances of surviving that were probably better if he just had the Article 15.*

R. 35–36 (emphasis added).

First Mr. Bernstein outlined his tactical reasons for going to trial as opposed to an administrative discharge, but then he admitted he knew the petitioner could still face an administrative discharge if the court members didn't impose a bad conduct discharge. Mr. Bernstein then surmised that the petitioner would fare better at an administrative discharge hearing based on the same offenses upon which he was convicted at a trial than he would if the discharge hearing was based on the imposition of the Article 15. Mr. Bernstein based this opinion on his past experience with a client who got a very light sentence at a special court–martial that was not later administratively discharged.[10] In light of his knowledge that his client would face an administrative hearing following a felony conviction, Mr. Bernstein's "tactical" reasons for proceeding to court in lieu of accepting an Article 15 were not only unreasonable, they were untenable.

In finding that counsel's performance, herein, did not fall below that expected of fallible attorneys, the Court of Appeals for the Armed Forces disregards the erroneous advice as to the nature of an Article 15 by determining that this was irrelevant to the petitioner's decision to go to trial. As to the advice that

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[10] Mr. Bernstein's opinion on the likelihood that the petitioner would not be administratively discharged or would fare well in an administrative discharge proceeding was particularly unwarranted considering that 1) Mr. Bernstein admitted that his prior client (who had not been discharged after being tried at a special court–martial) had a good performance record *unlike the petitioner* (R. 19); 2) Mr. Bernstein believed that even if the petitioner had accepted the Article 15 with all but one of the offenses being withdrawn by the commander, the petitioner's EPRs and UIF *still* made an administrative discharge a foregone conclusion (R. 45–46); and 3) Mr. Bernstein contended that it was the petitioner's two referral EPRs that caused the imposition of the BCD at the court–martial. (R. 34)

the petitioner wouldn't receive a punitive discharge if he went to trial, the Court of Appeals overlooked the vast majority of evidence, including the statement of co–counsel supporting that petitioner was so advised by the civilian defense counsel. The Court of Appeals finds that this was merely an inaccurate prediction as the end result and as such does not rise to the level of deficient performance.

Finally, the Court of Appeals for the Armed Forces determined, largely based on the clemency package, that counsel's overall performance was effective. However, the clemency package did not negate Mr. Bernstein's deficient pretrial advice. The Air Force Court noted that the Staff Judge Advocate recommended the suspension of the bad conduct discharge. Lieutenant Colonel Hannah, the Staff Judge Advocate, recommended clemency because of the recognition that petitioner's problems were alcohol related. Lieutenant Colonel Hannah was impressed by the petitioner's efforts to obtain help with his alcohol problem. App. Ex. XXVI. Lieutenant Colonel Hannah's recommendation had nothing to do with Mr. Bernstein's "persuasive" clemency submissions. Even Lt Col Hannah felt that the petitioner should have accepted the Article 15. A close reading of Lt Col Hannah's affidavit shows his disbelief that the petitioner's case even went to court.

The Court of Appeals for the Armed Forces, in ignoring the misadvice that an Article 15 was an admission of guilt, and in reasoning that counsel's statement to petitioner––that he wouldn't receive a punitive discharge at court–martial––was merely a miscalculation as to the end result and so not deficient performance, misses the mark. While an attorney is free to offer a prediction as to the possible sentence, it can be constitutionally ineffective to recklessly promise a client that a specific sentence will result. *See, Wellnitz v. Page,* 420 F.2d 935 (10th Cir. 1970); and *Brown v.*

Beto, 377 F.2d 950 (5th Cir. 1967). Moreover, to hold out as a certainty that a specific sentence will or will not result, without having performed a cursory investigation into the nature of the prosecutions case or the law in the area, is unreasonable. *See, Kimmelman v. Morrison,* 477 U.S. 365 (1986). That is what counsel did in this case, by failing to look into the military law adequately to grasp even the most basic principle of military justice, that is, that accepting an Article 15 is not an admission of guilt. Further, he failed to take steps to ascertain the reality of whether or not an administrative discharge likely would have followed the imposition of an Article 15.

Certainly, the petitioner has proven Mr. Bernstein's "deficient performance" under the *Strickland* standard. The petitioner has also demonstrated the required prejudice just as clearly. The petitioner would have accepted the Article 15 if not for the substandard advice of Mr. Bernstein. Even if the Article 15 proceedings resulted in punishment for the petitioner, the punishment would have been significantly more favorable than a felony conviction and a bad conduct discharge.

CONCLUSION

The Court of Appeals for the Armed Forces erred in upholding the petitioner's conviction which was obtained in violation of his Sixth Amendment right to the Assistance of Counsel. The Court of Appeals erred in assuming, rather than ruling, that the Sixth Amendment counsel requirements apply to pretrial advice, in light of the growing number of federal and state court's so recognizing. Further, the Court of Appeals erred in finding that defense counsel's performance was not deficient where counsel failed to take the steps a reasonable lawyer would have to make himself knowledgeable in the applicable military law and to investigate the potential

consequences of the various options before representing to petitioner that a bad conduct discharge would not result from court–martial. Clearly, the case *sub judice* is distinguishable from the typical case of demanding an Article 15 in lieu of trial based on a misjudgment of the strength of the government's case.[11] The ineffective assistance of Mr. Bernstein, evidenced by his gross misunderstanding of the Article 15 process; his assurances against the imposition of a bad conduct discharge; and his wholly untenable tactical reasons for proceeding to court, prejudiced the petitioner. The petitioner would not have demanded a court–martial in lieu of accepting the Article 15 but for Mr. Bernstein's erroneous advice.

MARGE A. OVERLY, Capt, USAF
Captain, United States Air Force
Appellate Defense Division
Counsel of Record

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Ave, Suite 343
Bolling AFB, DC 20332-8000
202–767–1562

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[11] Mr. Bernstein admitted he knew that the petitioner would be convicted of some of the charges. R. 36.

APPENDIX A

UNITED STATES, Appellee

v.

Larry E. MARSHALL, Technical Sergeant
U.S. Air Force, Appellant

No. 93–0375

Crim. App. No. S29406

United States Court of Appeals for the Armed Forces

Argued February 27, 1996

Decided Sep. 30, 1996.

Counsel

For Appellant: *Captain Richard D. Desmond* (argued); *Colonel Jay L. Cohen* (on brief).

For Appellee: *Major Jane M.E. Peterson* (argued); *Colonel Jeffery T. Infelise* (on brief).

Military Judge: William C. Thompson, Jr.

Opinion of the Court

SULLIVAN, Judge:

On February 28 and March 1, 1991, appellant was tried by a special court–martial composed of officer and enlisted members at Travis Air Force Base, California. Contrary to his pleas, he was found guilty of disobeying a lawful order to provide a specimen for a blood alcohol test, driving under the

influence of alcohol and being drunk and disorderly in violation of Articles 90, 111, and 134, Uniform Code of Military Justice, 10 USC §§ 890, 911, and 934, respectively. He was sentenced to a bad–conduct discharge and reduction to pay grade E–1. On July 2, 1991, the convening authority approved the sentence as adjudged.

Appellant appealed his conviction to the Court of Military Review (now the Court of Criminal Appeals). He asserted that his civilian defense counsel was ineffective. On September 23, 1992, the appellate court below rejected this assertion and affirmed the findings and sentence in an unpublished opinion.

Appellant then sought review in this Court on the basis that he was denied effective assistance of counsel. In an Order dated March 9, 1994, this Court set aside the decision of the then Court of Military Review and ordered a factfinding hearing pursuant to *United States v. DuBay,* 17 USCMA 147, 37 CMR 411 (1967), "solely for the purpose of determining the advice given as to the matter raised" in appellant's affidavits and "the tactical and legal considerations on which the advice was based."

The *DuBay* hearing was held at Travis Air Force Base, California, on May 19 and 26, 1994. After further review in light of the *DuBay* hearing and the findings of fact, the now Court of Criminal Appeals reaffirmed its earlier decision that appellant was not denied effective assistance of counsel in an unpublished opinion dated February 8, 1995.

On July 17, 1995, this Court granted review of the following issue raised by appellate defense counsel:

> WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE TURNED DOWN AN ARTICLE 15 AFTER HIS CIVILIAN DEFENSE COUNSEL

PROVIDED INCORRECT AND UNTENABLE ADVICE CONCERNING THE OUTCOME OF GOING TO TRIAL.

We hold that appellant was not denied effective assistance of counsel; his civilian defense attorney presented him with competent legal advice concerning the options available to him and their ramifications for his future military career. *United States v. Cordes,* 33 MJ 462 (CMA 1991); *United States v. King,* 30 MJ 59, 69–70 (CMA 1990); *see generally Bordenkircher v. Hayes,* 434 U.S. 357, 364, 98 S.Ct. 663, 668 (1978) (holding that criminal defendant must make "difficult choices"). *See also United States v. Boone,* 42 MJ 308, 312 (1995)(holding effective assistance of counsel is measured by combined efforts of entire defense team).

Prior to December 1990, while in Korea, appellant received two unsatisfactory Evaluation Performance Reports (EPRs), an Unfavorable Information File entry (UIF), and a control roster action. He met with a civilian attorney, Mr. Paul Bernstein, on December 18, 1990, to discuss removal of these negative actions from his personnel records so as to salvage his military career. On December 22, 1990, before Mr. Bernstein was officially retained, appellant was apprehended at the main gate of Travis Air Force Base for driving while intoxicated. On January 3, 1991, appellant was offered punishment under Article 15, UCMJ, 10 USC § 815, for willfully driving with a suspended license, and drunk and disorderly conduct. Captain Trigg was made available to counsel appellant on the Article 15. On January 7, 1990, appellant then returned to Mr. Bernstein for legal advice concerning the notice of Article 15 that had been served on him. Mr. Bernstein was officially retained sometime in mid-January 1991.

Capt. Trigg and Mr. Bernstein both told appellant that the Article 15 was an administrative punishment and that he

could accept it or turn it down and demand trial by court–martial. However, appellant then received conflicting advice from his attorneys, which is fully detailed in the record of the *DuBay* Hearing. Capt. Trigg advised appellant to accept the Article 15, but Mr. Bernstein recommended that appellant demand trial by court–martial. Mr. Bernstein's recommendation, and appellants acceptance of it, is the basis for appellant's claim of ineffective assistance of counsel.

The Sixth Amendment and Article 27, UCMJ, 10 USC § 827, confer upon a military accused the right to effective assistance of counsel. *United States v. Scott,* 24 MJ 186, 187–89 (CMA 1987). The Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984), enunciated a test to evaluate claims of ineffective assistance of counsel. This two–pronged test requires the defendant to demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Id.* at 687, 104 S.Ct. at 2064. *Cf. United States v. Polk,* 32 MJ 150, 153 (CMA 1991) (construing *Strickland, supra*). In sum, in order to constitute ineffective assistance, counsel's errors must be so serious as to deprive the defendant of a fair trial, "a trial whose result is reliable." *Strickland, supra* at 687, 104 S.Ct. at 2064; *accord United States v. Sanders,* 37 MJ 116, 118 (CMA 1993).

An appellate court's evaluation of attorney performance is made from counsel's perspective at the time of the conduct in question. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. The competence of counsel is presumed. *Id.; United States v. Scott, supra* at 188; Art. 27. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland, supra* at 690, 104 S.Ct. at 2066. Thus, judicial scrutiny of counsel's performance is highly deferential. *Id.* at 691, 104 S.Ct. at 2066. However, even this restricted scrutiny of counsel's

performance is not required if a person has no right to counsel at the time the averred ineffective assistance occurred. *See Evitts v. Lucey,* 469 U.S. 387, 396 n.7 (1985), citing *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2347 (1974).

Turning to appellant's claim, we note initially that Article 15 does not expressly require that a lawyer be made available to a servicemember before deciding to elect nonjudicial punishment or demand trial by court–martial. Neither does Part V, Manual for Courts–Martial, United States, 1984, expressly require counsel. Nevertheless, under Air Force Regulations, a member of the Air Force has a right to a military lawyer to explain his or her rights under Article 15 and "help [him or her] decide what to do." AF Form 3070 (June 1985); *see United States v. Mack,* 9 MJ 300, 320–21 (CMA 1980). In this context, an important preliminary question exists whether the *Strickland* and *Scott* decisions on effective assistance of counsel are applicable in this case. *See Evitts v. Lucey, supra.*

In this regard we note that the decision to impose nonjudicial punishment, to notify a servicemember of this intended action and afford him or her the right to demand trial by court–martial requires formulation of criminal charges under the Uniform Code of Military Justice. ¶ 4a(2), Part V, Manual, *supra;* ¶ 59c, AFR 111-9 (6 July 1990). However, they do not require the swearing of charges as required for courts–martial preferral. RCM 307(b), Manual, *supra; see United States v. Wattenbarger,* 21 MJ 41, 43 (CMA 1985). In appellant's case preferral of charges occurred after appellant decided to forgo nonjudicial punishment and demanded trial by court–martial. Since adversary proceedings had not been initiated against him at the time of the averred ineffectiveness of his counsel, no Sixth Amendment claim would normally lie. *See United States v. Kendig,* 36 MJ 291, 296 (CMA 1993); *United States v. Wattenbarger, supra.*

Nevertheless, appellant asserts that in his case this offer to accept nonjudicial punishment in lieu of trial by court–martial remained open until the first day of trial. He argues, therefore, that since his decision to forgo nonjudicial punishment upon advice of counsel continued after preferral of charges, it came within the scope of the Sixth Amendment. Some support exists for such a legal argument. *See United States v. Lonetree,* 35 MJ 396 (CMA 1992); *see also United States v. Mack, supra* at 320. Moreover, we presume the opportunity to consult with counsel provided in service regulations was intended to be meaningful in its own right. In any event, we can decide appellant's case by simply assuming the Sixth Amendment and its standard for effective assistance of counsel apply. *See also United States v. Kelly,* No. 95–0625, ___ MJ ___ (Sept. 30, 1996) (holding right to counsel to make decision to accept nonjudicial punishment implicit in various military statutes).

Appellant basically contends that civilian counsel "gave appellant flat out wrong advice." Final Brief at 13. He first challenges as erroneous advice purportedly given to appellant "that accepting Article 15 would be an admission of guilt." He also challenges his counsel's averred representation "that he would not receive a bad conduct discharge from the court–martial members." In addition, he notes that civilian defense counsel interferred with military defense counsel's attempt to dissuade appellant from going to trial. Finally, he challenges appellant's "untenable tactical reasons for proceeding to court."

At the outset, we note that Article 15 permits a commanding officer to impose nonjudicial punishment upon servicemembers under his command. Proceedings under this Article do not constitute criminal prosecutions. *See United States v. Kendig, supra* at 295. Moreover, punishments under this codal provision are generally less severe than can be

awarded by court–martial. *See* para. 5, Part V, Manual, *supra*. An Article 15 punishment, however, can serve as a basis for administrative separation. An acquittal at court–martial cannot. Moreover, an Article 15 proceeding is not a bar to a later prosecution at courts–martial for a serious offense. *See United States v. Pierce,* 27 MJ 367 (CMA 1989); Art. 15(f).

As noted above, we must view appellant's claims from counsel's perspective at the time the challenged advice was given. *Strickland, supra* at 690, 104 S.Ct. at 2066. Appellant's purpose in consulting Mr. Bernstein is particularly relevant in this regard. It was undisputed that appellant's main goal was to save his jeopardized career. In light of the offenses of which appellant was accused, he only had two options: accept an Article 15 proceeding and hope no discharge proceedings would be initiated, or demand trial by court–martial and hope he would secure an acquittal.

Appellant's initial complaint against civilian counsel concerns advice that accepting an Article 15 would be an admission of guilt. At the *DuBay* hearing, civilian defense counsel denied giving such advice to appellant, and the military judge made no finding of fact to the contrary. The *DuBay* record states:

> Q: Sir, did you advise Sergeant Marshall that if he were to accept the 15 that even if he weren't guilty of all of the specifications, that by accepting the 15 itself that he would be admitting to guilt to everything contained therein?
>
> A: No. What I am sure I advised him of was that he would be punished under Article 15 because at least some of what he was charged with he would be found––I don't know if "guilty" is a proper word––but he would be punished. Once he had an Article 15, that would be part of the administrative

> discharge package. So, the specific specifications weren't really critical to his overall strategy. His overall strategy was to try and save his career and not get discharged. You would want to get technical about the specifications if somehow you can cause a whole Article 15 to be thrown out, but that wasn't likely.

Moreover, the importance of such advice in this case is not readily apparent. The relevant dispute between counsel was whether the expected Article 15 punishment would lead to appellant's processing for an administrative discharge. The precise legal characterization of nonjudicial punishment had no bearing on that question. While defense counsels differed on the probable course of action by command, neither disputed that such administrative discharge action was legally possible on the basis of nonjudicial punishment. Accordingly, the complained of legal advice even if defective was not prejudicial to appellant.

Appellant next complains that civilian defense counsel incorrectly advised him that "he would not receive a bad conduct discharge from court–martial members." Civilian defense counsel again denied that he gave such advice to appellant, and the military judge made no finding to the contrary. The *DuBay* record states:

> Q: Okay. What advantages did you see in going to a Court? You mentioned the burden of proof as one.
>
> A: Burden of proof. Sometimes court–martial members are a little more reluctant to adjudge a BCD. I've participated in and defended quite a few court–martials which resulted in non BCDs where the punishment was roughly the equivalent to that of an Article 15 punishment. So––
>
> Q: Did you tell Sergeant Marshall that he would not get a conviction if he went to a court–martial?

A: No. You don't--I mean what you do is you try and pick the least bad of what your alternatives are.

Q: Did you tell him that he certainly wouldn't get a BCD if he went to a court–martial?

A: No. In any type of legal matter you can never guarantee any particular outcome. In this situation, you are just choosing between bad alternatives. I mean you are not choosing a situation which is good; you are just trying to choose between the least bad of the alternatives.

Q: Were there any other kind of promises made by you to Sergeant Marshall concerning the outcome of the court?

A: Promises, no.

Q: Whose decision was it to actually go to the court-martial?

A: Well, it was the client's decision. It is the client's decision to contact me and to hire me. Basically his whole objective was that he saw his career ending unless he took some sort of action; *it was all or nothing in his situation.* I guess he really viewed his seventeen year career as trying to save it.

(Emphasis added.)

Moreover, even if civilian counsel miscalculated the likely end result of appellant's court–martial, an erroneous sentence estimation by defense counsel is not necessarily deficient performance rising to the level of ineffective assistance of counsel. *See United States v. Gordon,* 4 F.3d 1567, 1570 (l0th Cir. 1993); *Doganiere v. United States,* 914 F.2d 165, 168 (9th Cir. 1990); *United States v. Arvanitis,* 902 F.2d 489, 494 (7th Cir. 1990); *Wellnitz v. Page,* 420 F.2d 935, 936 (10th Cir. 1970). *Cf. United States v. Straight,* 42 MJ 244 (1995) (holding defense counsel advice concerning the

increase of sentence on reconsideration was erroneous, but not prejudicial). Moreover, here civilian counsel advised appellant that even if he did not receive a BCD, there still might be an administrative discharge board following the court–martial. Accordingly, Mr. Bernstein's advice concerning possible results of court–martial did not constitute ineffective assistance of counsel. *See generally United States v. Bedania,* 12 MJ 373 (CMA 1982).

Finally, the basis for civilian counsel's advice to reject nonjudicial punishment and demand trial by court–martial are evident in the findings of fact at the *DuBay* hearing. Those findings show that at the time of trial, appellant had completed 17 years of active service in the Air Force, 3 years short of retirement, and desired retention. As noted by the Court of Criminal Appeals, both appellant and his civilian counsel believed that appellant could face an administrative discharge if he accepted nonjudicial punishment. Unpub. op. at 2. Moreover, testimony given at the *DuBay* hearing by appellant's squadron commander, Lieutenant Colonel Harsha, confirmed that an administrative discharge proceeding would have been initiated had appellant pursued the Article 15 route. Thus, a not–guilty finding at a court–martial constituted the only real hope appellant had to save his career.

We also note that an evaluation of the entire record now before us suggests that civilian defense counsel did provide effective legal assistance to appellant. The adjudged sentence in this case was a bad–conduct discharge and reduction to the grade of E–1. However, civilian defense counsel then submitted a clemency submission pursuant to RCM 1105, emphasizing that appellant had voluntarily enrolled in and completed an inpatient alcohol program following his trial. In addition, he established that the program director confirmed that appellant had a positive attitude about his rehabilitation. Finally, civilian counsel's clemency package led to a

recommendation by the staff judge advocate that the convening authority approve only a reduction to grade E–5 and suspend the bad–conduct discharge for a period of one year. *See* Addendum to Staff Judge Advocate's Recommendation, May 7, 1991. Before the clemency decision was made, however, appellant committed more acts of misconduct that resulted in preparation of a new staff judge advocate recommendation and approval of the bad–conduct discharge adjudged by the court–martial.

In sum, appellant received conflicting advice from his civilian attorney and military defense counsel, and obvious tension existed between them. Nevertheless, viewed in its entirety, appellant was presented with legal advice concerning his available options and the practical ramifications of either option that he might choose. *See United States v. Boone, supra.* Thus, we conclude that in advising appellant, counsels' performance did not fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers." *See Polk,* 32 MJ at 153. Of course, in hindsight, it is clear that appellant's decision to reject nonjudicial punishment did not save his Air Force career. This Court, however, will not engage in second–guessing counsel's strategic or tactical decisions reasonably designed to avoid that result. *See United States v. Rivas,* 3 MJ 282 (CMA 1977).

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judge CRAWFORD concur.

EVERETT, Senior Judge (concurring):

In my view, if an accused receives and relies on grossly erroneous and incompetent advice from counsel that leads him to request––and be provided––trial by court–martial, rather than nonjudicial punishment under Article 15, Uniform Code of Military Justice, 10 USC § 815, he would have a

Sixth Amendment claim requiring application of the *Strickland v. Washington,* 466 U.S. 668 (1984), two–pronged test.

Here, however, the advice provided by civilian counsel was competent and had as much rational basis as the advice presented by the military counsel. Thus, the Sixth Amendment claim proves to be without merit.

GIERKE, Judge (concurring in part and in the result):

I agree that appellant was not denied effective assistance of counsel. I decline to join in any suggestion that there is a statutory right to counsel in nonjudicial punishment proceedings. *See United States v. Kelly,* No. 95–0625, __ MJ __ (Sept. 30, 1996) (Gierke, J., concurring in part and in the result).

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant LARRY E. MARSHALL, FR435–82–5206

United States Air Force

ACM S29406 (f rev)

8 February 1995

Sentence adjudged 1 March 1991 by SPCM convened at Travis Air Force Base, California. Military Judge: William C. Thompson, Jr.

Approved sentence: Bad–conduct discharge and reduction to E–1.

Appellate Counsel for Appellant: Captain Richard D. Desmond (argued) and Colonel Jay L. Cohen.

Appellate Counsel for the United States: Captain Jane M.E. Peterson (argued) and Jeffery T. Infelise.

Before

DIXON, YOUNG, and BECKER
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

DIXON, Chief Judge:

Appellant's case is before this Court for a second review. Again, the sole issue is whether appellant was denied effective assistance of counsel regarding his decision to refuse nonjudicial punishment pursuant to Article 15, UCMJ. Pursuant to our first review, we affirmed appellant's conviction in an unpublished opinion dated 23 September 1992, finding that he had not been deprived of effective assistance of counsel. That decision was set aside on 9 March 1994 by order of the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces).

The order by the United States Court of Military Appeals mandated a factfinding hearing for the purpose of determining the advice given appellant by his counsel and the tactical and legal considerations on which the advice was based. The order specified that Articles 66 and 67, Uniform Code of Military Justice, would apply following that proceeding. Having now reviewed this case in the light of the factfinding hearing held on 19 and 26 May 1994, we again conclude appellant's claim he was denied effective assistance of counsel lacks merit. We affirm the findings of guilty and the sentence. Article 66(c), UCMJ.

There are no issues in this case concerning the way appellant's court–martial was conducted. Contrary to his pleas at trial, appellant was convicted of drunk driving, being drunk and disorderly, and of disobeying a lawful order to provide a blood test. Members at a special court–martial sentenced him to a bad–conduct discharge and reduction to the grade of E–1.

The convening authority approved the sentence as adjudged. We are satisfied based upon the facts developed at the factfinding hearing that appellant's civilian counsel fully advised appellant of the consequences of the decision to refuse nonjudicial punishment. It is clear the decision to refuse nonjudicial punishment was the option appellant consistently wished to pursue and not one precipitated by deficient advice. *United States v. Lonetree,* 35 M.J. 396 (C.M.A. 1992). Appellant's contention that he turned down nonjudicial punishment only because of the advice he received from his civilian counsel simply is not supported by the facts.

The circumstances leading up to appellant's decision to reject nonjudicial punishment are set forth in the findings of fact from the mandated hearing. At the time of trial, appellant had completed 17 years of active service in the Air Force. His purpose in seeking the assistance of a civilian attorney was to find a way to save his career. Both the appellant and his civilian counsel shared the understanding appellant would face administrative discharge if he accepted nonjudicial punishment. Testimony given at the factfinding hearing by appellant's squadron commander, Lieutenant Colonel Harsha, confirmed that an administrative discharge proceeding would have been initiated had nonjudicial punishment been accepted.

Appellant clearly understood that his career was in serious jeopardy and that neither of the legal options he faced offered him much hope of saving his career. By accepting nonjudicial punishment, he could avoid a court–martial conviction, but the likelihood of administrative discharge was great. His civilian counsel informed him that he would be convicted if tried by court–martial but concluded he would have a better chance of saving his career through a court–martial. Consequently, his civilian counsel suggested

rejecting nonjudicial punishment and undergoing a court–martial was the lesser of two evils.

Appellant's civilian counsel made no promises concerning the outcome of a court–martial. He explained the fee for his representation would be the same for a court–martial as it would for an administrative discharge proceedings. From the outset, appellant was advised by his military defense counsel to accept nonjudicial punishment. We are satisfied appellant was fully apprised of the consequences of rejecting nonjudicial punishment and personally chose to take the risks inherent in his decision.

This appellant was seemingly in a "no–win" situation. With the benefit of hindsight, it could be argued that appellant's decision to reject nonjudicial punishment was ill–advised. However, as we observed during our initial review, a worse than expected result at a court–martial does not necessarily equate to ineffective assistance of counsel. Appellate courts in assessing counsel's effectiveness have refused to second–guess strategic or tactical decisions. *United States v. Rivas,* 3 M.J. 282 (C.M.A. 1977); *United States v. Coronado,* 15 M.J. 750 (A.F.C.M.R. 1983). The standard for reviewing ineffective assistance claims based upon a counsel's performance at trial is well established. The appellant must first show that counsel's performance was deficient and must then establish that the deficient performance prejudiced the defense so as to deprive the accused of a fair trial. *Strickland v. Washington,* 466 U.S. 668 (1984). In this instance, the claim of ineffective assistance of counsel is directed at counsel's pre–trial performance. For the purpose of this review, we will assume the *Strickland* standard applies to counsel's pre–trial advice. Using that standard, we conclude this appellant has failed to meet either prong of the *Strickland* test.

Looking at the entire record, this Court can not say the

advice provided by civilian counsel was flawed. The stated objective was to salvage appellant's career. Furthermore, the strategy employed by appellant's civilian counsel nearly succeeded. Although the adjudged sentence was a bad–conduct discharge and reduction to the grade of E–1, the clemency submission prepared by his civilian counsel highlighted the fact that appellant had voluntarily enrolled in and completed an inpatient alcohol program following his trial. A statement from the program director confirmed appellant's attitude about rehabilitation had been positive. In light of the persuasive clemency package, the Addendum to the Staff Judge Advocate's Recommendation prepared on 7 May 1991 advised the convening authority to approve only a reduction to the grade of E–5 and suspend the bad–conduct discharge for a period of one year. This recommendation, if followed, would have succeeded in salvaging appellant's career. However, subsequent misconduct on the part of appellant resulted in the preparation of a new staff judge advocate recommendation and the new advice led to the eventual approval of the adjudged sentence.

This Court finds no merit in appellant's claim he was denied effective assistance of counsel. His affidavit purporting to shift the blame for his current plight to his civilian counsel not only lacks factual support, but unfairly condemns his civilian counsel for supporting appellant's stated objective. We are convinced appellant made his decision regarding nonjudicial punishment as a matter of personal choice rather than being persuaded to do so by any bad advice from his civilian attorney. As this Court has previously observed:

> Because claims of inadequate representation are oft–times made by dissatisfied clients seeking to assign the blame for their predicament to their

> lawyers rather than themselves, the law presumes that counsel is effective, and places on the appellant the burden of establishing ineffectiveness.

United States v. Mansfield, 24 M.J. 611, 616 (A.F.C.M.R. 1987). Here, appellant has failed to meet that burden.

Having examinet the record of trial, the assignment of error, and the government's reply thereto, we have concluded that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the appellant's substantial rights was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judge YOUNG and Judge BECKER concur.

OFFICIAL

ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

APPENDIX C

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

v.

Technical Sergeant LARRY E. MARSHALL, FR435–82–5206

UNITED STATES AIR FORCE

ACM S29406

23 September 1992

Sentence adjudged 1 March 1991 by SPCM convened at Travis Air Force Base, California. Military Judge: William Thompson, Jr.

Approved sentence: Bad–conduct discharge and reduction to E–1.

Appellate Counsel for the Appellant: John A. Wickham, Esq. (argued), Colonel Jeffrey R. Owens, Major Mary C. Yastishock, Captain Ursula P. Moul, and Gary Myers, Esq.

Appellate Counsel for the United States: Major Kingston E. Smith (argued), Colonel Richard L. Purdon, Lieutenant Colonel Brenda J. Hollis, Lieutenant Colonel Jeffery T. Infelise, Major Paul H. Blackwell, Jr., Captain James C. Sinwell, and Captain Jane M.E. Peterson.

Before

DIZON, PRATT, and McLAUTHLIN
Appellate Military Judges

OPINION OF THE COURT

DIXON, Chief Judge:

Contrary to his pleas, appellant was convicted of drunk driving, being drunk and disorderly, and of disobeying a lawful order to provide a blood test. A special court–martial, consisting of members, sentenced him to a bad–conduct discharge and reduction to the grade of E–1. The convening authority approved the sentence as adjudged.

The sole issue raised on appeal was whether appellant was deprived of effective assistance of counsel because he was advised by his civilian defense counsel to reject nonjudicial punishment. We find he was not and affirm.

Appellant is a technical sergeant with 17½ years of active service in the Air Force. Prior to trial, he was offered nonjudicial punishment for the same minconduct which resulted in his court–martial. Appellant initially consulted with a military defense counsel, who later became his detailed trial defense counsel. His military defense counsel, after discussing the various options with appellant, recommended he accept nonjudicial punishment. Thereafter, appellant retained civilian defense counsel to represent him and elected to turn down nonjudicial punishment. Military defense counsel remained on appellant's defense team but was instructed by civilian counsel and appellant that his sole responsibility was to advise on procedural matters.

Post–trial affidavits from appellant and his detailed trial defense counsel were submitted in support of the ineffective assistance claim. These affidavits disclose material

differences between his civilian and military defense counsel as to what tactics and strategies the defense should utilize. The principal issue between the two, however, centered on whether appellant should accept nonjudicial punishment.

Both post–trial affidavits address discussions between appellant and his counsel the day before trial. Military counsel advised appellant to accept the still open nonjudicial punishment option. Civilian counsel acknowledged that appellant probably would be convicted of at least some of the charges but continued to advise him to reject nonjudicial punishment. Civilian counsel opined that appellant would not receive a bad–conduct discharge and offered to continue to represent the appellant if the Air Force tried to administratively separate him.

With the benefit of hindsight, it now is clear that appellant's decision to reject nonjudicial punishment was ill–advised. However, a worse than expected result at a court–martial does not necessarily equate to ineffective assistance of counsel. The courts in assessing counsel's effectiveness have refused to second–guess strategic or tactical decisions. *United States v. Coronado,* 15 M.J. 750 (A.F.C.M.R. 1983); *United States v. Rivas,* 3 M.J. 282 (C.M.A. 1977). The standard for reviewing ineffective assistance claims is well established. The appellant must first show that counsel's performance at trial was deficient and must then establish that the deficient performance prejudiced the defense so as to deprive the accused of a fair trial. *Strickland v. Washington,* 466 U.S. 668 (1984).

Appellant has failed to meet either prong of the *Strickland* test. There has been no showing that his civilian defense counsel's performance at trial was so flawed that the trial result is called into question. *See United States v. Savinovich,* 25 M.J. 905 (A.C.M.R. 1988); *United States v. Scott,* 24 M.J. 186 (C.M.A. 1987). In this case, appellant and

his counsel were successful in obtaining an acquittal on one contested specification concerning the disobedience of a lawful order. In fact, appellant's appellate brief concedes the absence of any legal error in the trial itself.

We reject appellant's contention that the civilian defense counsel's pretrial advice that he not accept nonjudicial punishment entitles him to relief. Although the recipient of conflicting advice, it is clear that appellant was fully and thoroughly informed of his various options and of their potential repercussions. Whether or not to demand trial by court–martial and force the government to prove guilt beyond a reasonable doubt is, in the final analysis, a personal decision to be made by the accused. This Court will not come to the aid of an appellant who, after fully exploring his legal options, chooses to ignore good legal advice and instead elects to follow what subsequently proves to be bad advice.

Having examined the record of trial, the assigned error, and government's reply thereto, we conclude the findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the accused was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judges PRATT (who participated in this decision before his reassignment from the Court) and McLAUTHLIN concur.

OFFICIAL

NAOMI D. ALLEN
TSgt, USAF
Chief Court Administrator, AFCMR